IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 43 of 2003

C I T JODHPUR
V/S
SMT. CHITRA DEVI SONI

Mr. KK BISSA, for the appellant / petitioner

Mr. ANJAY KOTHARI, for the respondent

Date of Order : 29.11.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

ORDER

Aggrieved by the order dated 17.9.2002, passed by Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur, in ITSSA No.7/JP/97, revenue has preferred this appeal.

While the defects were overruled by this Court on 6.8.2003, and admitting the appeal, following substantial questions of law were framed:-

> "1. Whether for having recourse to assessment for block period under Chapter XIV-B, a valid search u/s.132 is a condition precedent and mere fact of search is not enough to give jurisdiction to the Assessing Officer to have recourse to provision under Chapter XIV-B?
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> 2. If so, whether in the facts and circumstances of the present case the Tribunal was right to hold that the search conducted in the present case was

invalid?”

The facts giving rise to the present appeal are, that assessee-Chitra Devi filed appeal before the Tribunal, challenging the validity of the assessment order, being violative of principle of natural justice. The assessee contended that the assessment order is bad in law for the reason, that the same was passed on belief of the assessing authority, without disclosing any material as is required under Section 132 of the Income Tax Act. According to assessee, there was no material with the Director, to form the belief, as is required under the provisions of Section 132(1), and in absence of any material to this effect, the assessment order passed is not maintainable, and therefore, the assessment order deserves to be set aside.

The Tribunal in appeal decided the said issue, after referring various judgments on the issue, as to whether Tribunal is having jurisdiction to examine the validity of the authorisation, based on reasons duly recorded in writing for search, when the same is challenged before the Court/Tribunal. According to the Tribunal, revenue was given various opportunities to produce the material, to show that authorisation was based on existence of reasons, about there being one or more of the circumstances enumerated in Section 132(1) (a) to (c), as

is required under Section 132(1) of the Income Tax Act. It was stated, that on 12.10.2001 appeal was adjourned to 21.12.2001 for the purpose of production of record showing authorisation being based on existence of reasons about there being one or more of the circumstances enumerated in Section 132(1) (a) to (c). Then the matter was further adjourned to 12.2.2002, however when the material was not produced, the matter was further adjourned to 19.3.2002, and finally when revenue could not produce the record, showing authorisation being based on existence of reasons, about there being one or more of the circumstances enumerated in Section 132(1) (a) to (c). The arguments were heard on 19.3.2002 and 27.3.2002. Even during the course of arguments also, record containing existence of material, which may have given reasons to believe the competent authority, about existence of any one or more of the circumstances postulated under Section 132(1)(a)(b)(c) could not be produced, rather representative appearing for the revenue showed his helplessness to produce the record before the Tribunal. Thus, the Tribunal after granting ample opportunity to the revenue for production of the record, decided the issue, holding, that in absence of authorisation being based on reasons, required under Section 132(1) of the Income Tax Act, search was not valid, which otherwise was taken as a basis, for the purpose of passing the order by assessing authority. Even factum of authorisation based on reasons, has not come on record. In

those circumstances, Tribunal passed the order, to the effect, that search was not valid in absence of authorisation based on reasons, as required by Section 132 (1), and consequentially, block assessment was held to be illegal.

It has been argued by the counsel appearing for the revenue that the Tribunal cannot look into the validity of the search, as conducted under the provisions of Section 132 of the Income Tax Act. It was urged that the Tribunal is having no jurisdiction, or competence, to look into this aspect, and therefore, the judgment rendered by the Tribunal is without jurisdiction, and goes beyond their competence, and the only question, which has been pressed finally is, regarding the competence of the Tribunal to declare a search to be illegal, or to be invalid.

Per contra, counsel appearing for the assessee submitted, that when the basic foundation, as called by the Tribunal, to show even existence of the authorisation, to be based on existence of one or more of the reasons required under Section 132(1) of the Income Tax Act is not in existence, then the Tribunal had held assessment of the block period to be illegal, while holding the search to be without valid authorisation. It was submitted that in Section 158B, the definition of block period is given, which reads as under:-

> "**158B.** In this Chapter, unless the context otherwise requires.-
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> (a) "block period" means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted under section 132 or any requisition was made under section 132A and also includes the period upto the date of the commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made:
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> **Provided** that where the search is initiated or the requisition is made before the 1st day of June, 2001, the provisions of this clause shall have effect as if for the words "six assessment years", the words "ten assessment years" had been substituted;"

It is contended that a perusal of the above definition shows, that the block period means the period comprising of the previous years, (such number of years as may be prescribed from time to time) preceding the previous year, in which search was conducted under Section 132, or any requisition was made under Section 132A. Thus, for attracting this provision, it is necessary, that a search is required to be conducted under Section 132, and obviously, for conducting such search, authorisation is required to be given, only if the concerned competent authority has reasons to believe, about existence of one or more circumstances, enumerated in clause (a) to (c) of Section 132(1), as required under the said provision, and in absence of authorisation, based on reasons, as required

under Section 132, the "block assessment" itself cannot be made. In view of the argument raised above, it was prayed that the judgment of the Tribunal deserves to be maintained.

We have considered the rival submissions of the parties, and scanned the matter carefully.

At the outset it may be noticed, that it is not in dispute, that the assessment in question has been made under Chapter XIV-B, for the "block period". Obviously under Chapter XIV-B, the assessment can be made for a "block period", and the previous year, in which search was conducted. Then, a look at the opening section of the chapter, being Section 158B, as quoted above, shows, that it clearly gives definition of "block period", and basic ingredient of the term "block period" is, that it relates to certain number of years, relating to, and relevant to, the search conducted under Section 132, or requisition made under Section 132A. Since in the present case we are not concerned with the eventuality under Section 132A, the obvious conclusion is, that there should be a search conducted under Section 132. In that view of the matter, the provisions of Section 132 are required to be looked into, and a look thereat shows, that the opening language of sub-section (1) thereof contemplates, existence of certain eventualities, in the event of existence whereof, the competent authority should have reason to believe, the

existence of the circumstances mentioned in Clause (a) to (c), and in that event the competent authority mentioned in the Clauses (A) and (B) can authorise the authorities mentioned in these two clauses to conduct the search. Consequent upon such authorisation the authority authorised may undertake the actions mentioned in further clauses of Section 132. We may at this stage, therefore, gainfully quote the provisions of Section 132 (1), and clauses (A) and (B) thereof, which read as under :-

> "**132.** (1) Where the Director General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that-
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> (a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or
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> (b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act,1922 (11 of 1922), or under this Act, or
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> (c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or

> other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),
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> then,-
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> (A) the Director General or Director or the Chief Commissioner or Commissioner, as the case may be, may authorise any Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or
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> (B) such Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Comissioner or Income-tax Officer....”

A bare reading of the above quoted clauses leaves no manner of doubt, in view of the use of word “then”, that the action of authorising, provided under Clauses (A) and (B) has, of necessity, to be preceeded by the existence of the requirements of the other part of said section, as quoted above. In other words, existence of reason to believe, in consequence of information in possession of the officer, mentioned in sub-section (1), about existence of one or more of the eventualities, catalogued in Clauses (a) to (c), is the sine qua non to entitle the authority to make authorisation, as required by Clauses (A) and (B). The obvious consequence is, that if the requirement of sub-section (1), about existence of the reason to believe, consequent upon the information in possession of the

concerned authority, is not satisfied, there could possibly be no authorisation, irrespective of the fact, that it may have been made, and in turn, if any search is conducted in pursuance of the authorisation issued in absence of requisite sine qua non, the search cannot be said to be a "search" under Section 132 of the Act, as contemplated by the provisions of Section 158B of the Act.

The above being the legal position, since the assessment in the present case is made under Chapter XIV-B, and when it was specifically challenged by the assessee, that the circumstances contemplated by Section 132(1) did not exist, this is a matter which goes to the root of the matter about jurisdiction of the assessing authority, to proceed under Chapter XIV-B, the Tribunal was very much justified, and had jurisdiction to go into the question, as to whether the search was conducted consequent upon the authorisation having been issued, in the background of the existence of eventualities and material, mentioned in Section 132(1). We are conscious of the fact, that it is not open to us, or the Court, to go into the question of sufficiency of the reasons, on the basis of which the competent authority may have had entertained the reason to believe the existence of one or more of the eventualities under Clauses (a) to (c), but then, the question as to whether there at all existed any material to have the reason to believe, even purportedly, consequent upon

information in his possession, with the competent authority, is the matter, which can definitely be looked into by the Tribunal, so also by this Court, as, the absence would vitiate the entire action.

We may at this place refer to a judgment of this Court, in Kusum Lata Vs. Commissioner of Income-Tax, reported in 1989(180) ITR 365, wherein the Division Bench of this Court has taken the view, that the Court cannot go into the sufficiency of the information, or the material. All that has to be seen is, as to whether some material, in fact, existed or not, for coming to the opinion, and to have the reason to believe, that any person is in possession of any undisclosed income or property. Obviously as to whether the circumstances contemplated by clauses (a) to (c) existed, or not.

In that view of the matter, if we proceed to examine the present case, a perusal of the impugned order shows, that the Revenue was given sufficient time to produce the record, which may be containing the relevant material, including information in possession of the competent authority, on the basis of which, he may have entertained the reason to believe the existence of one or more of the eventualities covered by clause (a) to (c) of Section 132(1). However, even after availing more then ample opportunities, the representative of the Revenue

ultimately showed his helplessness to produce the record, and therefore, even the factum, of existence of authorisation, based on reason to believe, which might have been entertained, consequent upon information in possession of the authority, also could not come on record. That being the position, in our view, the learned Tribunal was fully justified, in holding, that when the authorisation to conduct the search, based on reasons, germane to Section 132(1), does not exist, the search becomes invalid, with the obvious conclusion, that the assessment order based on such search cannot stand, and was rightly set aside. Even at the cost of repetition it may be observed, that in absence of a legal search, in accordance with the provisions of Section 132, "block period", or the previous year, in which the search was conducted, cannot be said to have come into existence, and therefore, if any assessment order is passed, based on such search, it obviously cannot stand.

Result of the aforesaid discussion is that both the questions, so formulated in the order dt. 8.2.2003, are answered against the Revenue, and in favour of the assessee.

The appeal thus has no force, and the same is dismissed.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.

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Perusal of the record shows that the assessee was given sufficient time to produce authorisation based on reasons duly recorded in writing as required under Section 132, however, even after availing opportunities the representative of the revenue showed his helplessness to produce the record, and therefore, even the factum of existence of the authorisation based on reasons duly recorded in writing could not come on record. In view of those facts, the Tribunal was justified to hold that when the authorisation based on reasons duly recorded in writing to conduct the search does not exist, the search becomes invalid and obvious consequence is that the assessment order passed based on such search cannot stand and was rightly set aside. A look at the provisions of Section 158B also shows that for a block period the basic requirement is that the relevant period is to be taken preceding the previous year in which search was conducted under Section 132 of the Act. Obviously the search has to be conducted as per the provisions of Section 132 so as to attract the provisions of Section 158B of Chapter XIV-B of the Income Tax Act. In absence of a search in accordance with the provisions of Section 132, a block period cannot come in

existence and obvious consequence would be that if any assessment order is passed based on such search, it cannot be said to be legal. The Tribunal has considered this aspect in reference with the various judgments rendered in the impugned order itself, wherein it was held that if a search is conducted with authorisation then the Tribunal can look into the aspect and decide the same issue. Hence in view of the judgments including the judgment of this Court in Kusum Lata Vs. Commissioner of Income-Tax reported in 1989(180) ITR 365 as well as the facts of this case, it cannot be said that the Tribunal has committed any illegality in holding the search to be invalid or it cannot be said that in the facts and circumstances of the case the Tribunal was not authorised to declare the search to be invalid so as to set aside the assessment order.

Accordingly, the substantial questions of law so framed are decided against the revenue and in favour of the assessee.

The appeal thus has no force and the same is dismissed.

Assessment of undisclosed income as a result of search.

158BA.(1) Notwithstanding anything contained in any other provisions of this section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

Explanation.-For the removal of doubts, it is hereby declared that-

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period.

(3) Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block

period.

"**132.** (1) Where the Director General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that-

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act,1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),..."

then,-

(A) the Director General or Director or theChief Comissioner or Commissioner, as the case may be, may authorise any Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or

(B) such Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Comissioner or Income-tax Officer,